STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER DAVID,

Plaintiff-Appellant,

V

SAINT MARY'S MEDICAL CENTER,

Defendant-Appellee.

UNPUBLISHED
August 16, 2002

No. 231007
Saginaw Circuit Court
LC No. 98-025836-NZ

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

In this employment case alleging wrongful discharge and age discrimination, plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues the trial court erred in determining that her oral contract of just-cause employment could be modified. To properly determine this issue, we must first determine whether a just-cause employment relationship existed between plaintiff and defendant. Plaintiff asserts she presented sufficient evidence of an express oral agreement for just-cause employment and a legitimate expectation that she would be discharged only for just cause. We disagree.

A motion for summary disposition pursuant to MCR 2.116(C)(10), which tests the factual support for a claim, is reviewed de novo. *Oade v Jackson National Life Ins Co of Michigan*, 465 Mich 244, 251; 632 NW2d 126 (2001). This Court considers the affidavits, pleadings, depositions, admissions, and all other evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*.

Under Michigan law, employment relationships are presumably terminable at the will of either party. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). The presumption of employment at will can be overcome with proof of a contract provision for either a definite term of employment, or one prohibiting discharge without just cause. *Id*. at 164. A plaintiff can establish contractual "just cause" employment in three ways:

> (1) proof of "a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause"; (2) an express agreement,

> either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a "legitimate expectation" of job security in the employee. [*Id*. (Citations omitted).]

Plaintiff first claims she received specific and unequivocal promises regarding job security. Plaintiff testified at deposition that when she inquired about job security at the initiation of her employment she was referred to the employee handbook for general reasons that would be necessary to discipline employees. Plaintiff further testified that when she was promoted to nurse manager of the burn unit, she expressed concerns regarding job security to her current supervisor and was told not to worry because if she did not do anything wrong, nothing would happen.

To create just-cause employment through oral assurances, the assurances must be clear and unequivocal. *Id*. at 171. Moreover, the assertions must demonstrate both negotiation and mutual assent to the just-cause employment relationship. *Id*. at 172; *Bracco v Michigan Technological University*, 231 Mich App 578, 598-599; 588 NW2d 467 (1998). Negotiation is important; statements more akin to stating a policy rather than offering an express contract are insufficient. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 645; 473 NW2d 268 (1991).

Viewing plaintiff's allegations in the light most favorable to her, her assertions fail to establish a question of fact regarding whether an express oral just-cause relationship was created. Although plaintiff was concerned about job security and inquired about the matter, she did not specifically *negotiate* for job security. *Lytle, supra*. Moreover, the statements made to her at that time were merely statements of defendant's *policy*, and did not rise to the level of offering an express contract. *Rowe*, *supra*.

Plaintiff, however, also asserts that defendant created a legitimate expectation of just-cause employment. Plaintiff bases this assertion on the alleged oral representations regarding job security and sections of the employee handbooks she received at the initiation and during the course of her employment. However, provisions in a handbook do not create enforceable rights when, as here, the handbook expressly states that those provisions are not intended to create an employment contract. *Lytle*, *supra* at 169, citing *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405; 550 NW2d 243 (1996).

The employment manual plaintiff received in 1980 specifically stated that it was for informational purposes only, and that it did not create a contractual relationship between the employer and employee. Further, at the time plaintiff received the 1991 and 1994 handbooks, she signed a statement acknowledging that the manual did not constitute an employment contract. Therefore, her reliance on any provisions in the handbooks, including those regarding grievance and discipline procedures, to create either a contractual right to or a legitimate expectation of just-cause employment is misguided. See *Lytle*, *supra* at 166-169; *Heurtebise*, *supra* at 413-414. Moreover, an employer can unilaterally change a written for-cause policy to an at-will policy without reserving the right, provided reasonable notice is given. *In re Certified Question*, 432 Mich 438, 456-457; 443 NW2d 112 (1989). With the revised handbooks, plaintiff was given sufficient notice of any alleged change in employment status. Therefore, no question of fact exists regarding whether an express oral agreement or legitimate expectations of just-

cause employment were created, and the lower court properly granted defendant's motion for summary disposition with regard to plaintiff's wrongful discharge claim.

For these same reasons, we reject plaintiff's contention that the trial court's failure to address her claim that defendant breached the fair treatment policy outlined in its employee handbook requires reversal. Because each of the employee handbooks provided to plaintiff either contained or were accompanied by a disclaimer indicating that the handbooks did not create an employment contract, the policy provisions contained therein created no enforceable rights. *Lytle*, *supra*; *Heurtebise*, *supra*.

Finally, plaintiff argues the trial court improperly granted summary disposition regarding her age discrimination claim under the Civil Rights Act, MCL 37.2101 *et seq*. Under MCL 37.2202(1)(a), an employer cannot "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." The Supreme Court addressed the necessary elements of age discrimination in *Lytle*, *supra* at 172-174:

> To establish a prima facie case of discrimination, plaintiff must prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered an adverse employment action, . . . ; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. Once plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for plaintiff's termination to overcome and dispose of this presumption.
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> Once the defendant produces such evidence, even if later refuted or disbelieved, the presumption drops away, and the burden of proof shifts back to plaintiff. At this third stage of proof, in this case in response to the motion for summary disposition, plaintiff had to show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination.

Age discrimination can be based on either intentional discrimination or "disparate impact" discrimination. *Alspaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 563; 634 NW2d 161 (2001). However, intentional discrimination is not a separate theory, but is another method or alternative theory for disparate treatment. *Meagher v Wayne State University*, 222 Mich App 700, 709; 565 NW2d 401 (1997). To establish a prima facie case of intentional age discrimination, a plaintiff must prove, by a preponderance of the evidence, the following: (1) that she was a member of the protected class; (2) she suffered an adverse employment action; (3) she was qualified for her position; and (4) that she was replaced by a younger person. *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999), remanded on other grounds 465 Mich 919 (2001). To prove disparate treatment, the plaintiff must show that she was a member

of the class entitled to protection under the act and that she was treated differently than persons of a different class for the same or similar conduct. *Meagher*, *supra*.

Assuming plaintiff did in fact make a prima facie case of age discrimination, defendant produced sufficient evidence of a legitimate nondiscriminatory reason for plaintiff's demotion and alleged constructive discharge. Although plaintiff refutes those reasons, plaintiff did not meet her burden of showing by a preponderance of the evidence that defendant's proffered reasons were mere pretext for discrimination. Moreover, in terms of the disparate impact theory, plaintiff failed to show that she was treated differently than any younger employees for the same or similar conduct.

Finally, because we find plaintiff was an at-will employee who could be discharged for any reason or no reason and there is no evidence of age discrimination, we decline to address plaintiff's claim that the lower court erred in failing to address her constructive discharge claim.

We affirm.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell